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ABSTRACT

This information memorandum describes four acts enacted during the 1987-1988 session of the Wisconsin Legislature dealing with mental health issues: (1) 1987 Wisconsin Act 366, relating to commitment standards and procedures for and alternatives to involuntary commitment; (2) 1987 Wisconsin Act 367, relating to outpatient mental health treatment of minors 14 years of age or older; (3) 1987 Wisconsin Act 368, relating to community support programs and guardianship grants; and (4) 1987 Wisconsin Act 394, relating to services for and commitments of mentally ill inmates and criminally committed persons. Part I of the document discusses development of the legislation; part II highlights the four acts; and parts III through VI describe the background and major provisions of 1987 Wisconsin Acts 366, 367, 368, and 394 respectively. The appendix contains commitment standards as amended by the 1987 Wisconsin Act 366. (NB)

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MENTAL HEALTH LEGISLATION ENACTED BY THE 1987 LEGISLATURE

(1987 WISCONSIN ACTS 366, 367, 368 AND 394)

CG 021114

INFORMATION MEMORANDUM 88-12

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May 16, 1988

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Information Memorandum 88-12

MENTAL HEALTH LEGISLATION ENACTED BY THE 1987 LEGISLATURE (1987 WISCONSIN ACTS 366, 367, 368 AND 394)

INTRODUCTION

This Information Memorandum describes four Acts enacted during the 1987-88 Session of the Wisconsin Legislature dealing with mental health issues. These Acts are:

- 1987 Wisconsin Act 366, relating to commitment standards and procedures for and alternatives to involuntary commitment. This Act took effect on May 3, 1988.

- 1987 Wisconsin Act 367, relating to outpatient mental health treatment of minors 14 years of age or older. This Act took effect on May 3, 1988.

- 1987 Wisconsin Act 368, relating to community support programs and guardianship grants. This Act took effect on May 3, 1988.

- 1987 Wisconsin Act 394, relating to services for and commitments of mentally ill inmates and criminally committed persons. This Act took effect on May 3, 1988.

Copies of these Acts may be obtained from the Documents Room, Basement Rotunda, State Capitol, Madison, Wisconsin 53702; telephone (608) 266-2400.

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PART I

DEVELOPMENT OF LEGISLATION

The four bills which, when enacted, became the four Acts described in this Memorandum, were developed by the Legislative Council's Special Committee on Mental Health Issues and its Advisory Committee on Mentally Ill Inmates.

The Special Committee on Mental Health Issues was created primarily in response to concerns that existing involuntary commitment standards did not effectively ensure the treatment of all persons who needed mental health treatment but were not willing to seek it voluntarily. In particular, the Special Committee was created in response to numerous bills introduced during recent legislative sessions calling for the creation of a "fifth standard" for the involuntary commitment of mentally ill persons. These bills would have allowed the involuntary commitment of mentally ill persons who needed treatment but did not meet any of the four commitment standards because they were not "dangerous."

The charge of the Special Committee was broader, however, than an examination of commitment standards. The Special Committee was directed, by the Legislative Council, to:

> ...undertake a thorough examination of present mental health concerns, including a study of: (a) community and institutional programs and services for the mentally ill; (b) present civil commitment standards and alternatives thereto; and (c) services available to the mentally ill in prisons and jails.

The Special Committee was assisted in its examination of the services available to the mentally ill in prisons and jails by the Advisory Committee on Mentally Ill Inmates. Specifically, the Advisory Committee was directed, by the Legislative Council, to study:

> ...problems related to the care and treatment of mentally ill inmates in county jails and state prisons, with emphasis on the chronically mentally ill.

The Legislative Council established the Special Committee on Mental Health Issues by a mail ballot on February 20, 1986. The members of the Special Committee were: Senators Fred A. Risser, Chairperson, Brian Rude, Secretary, and Susan Engeleiter; Representatives John D. Medinger and

Barbara Notestein, Co-Vice-Chairpersons, Stanley Gruszynski, Thomas Ourada and Peggy Rosenzweig; and Public Members John Easterday, Walter J. Gleason, Ph.D., Dianne Greenley, Dr. Pauline Jackson, Susan Koppa, Rosalyn Libman, Robert McKnight, Paul Meyer, Carl Otte, Judge Robert R. Pekowsky, Robert Piedl and Sharon Vander Zyl.

The Legislative Council established the Advisory Committee on Mentally Ill Inmates by an April 15, 1986 mail ballot. The members of the Advisory Committee were: Representatives John D. Medinger, Chairperson, Dismas Becker, Carol A. Buettner and Cathy S. Zeuske; and Public Members Ronald Beckman, Michael Carr, Sheila Dresen, Joe McCarthy, Carl Otte, Fernando Perez, Michael Schroeder, Pearl E. Tucker and Bev Young.

The Special Committee and the Advisory Committee completed their work in June 1987, and recommended to the Legislative Council the four bills (1987 Senate Bills 351, 352 and 353 and 1987 Assembly Bill 680) which, as amended by the Legislature and affected by the Governor's partial vetoes, became the four Acts described in this Memorandum.

PART II

HIGHLIGHTS OF 1987 WISCONSIN ACTS 366, 367, 368 AND 394

This Part briefly lists key provisions of 1987 Wisconsin Acts 366, 367, 368 and 394. Each of these Acts is described, in detail, in Parts III to VI of this Memorandum.

A. ACT 366

1. Expands the third and fourth standards of dangerousness to permit commitment or detention of: (a) a person who will not avail himself or herself of community services; or (b) a person for whom food, shelter or other care is provided by family members or others not associated with treatment programs. [See the Appendix for the four commitment standards, as amended by Act 366.]

2. Creates standards and procedures for guardianship and authorization of court-ordered medications for persons who are chronically mentally ill.

3. Requires the evaluation of committed persons 21 days prior to the expiration of the person's period of commitment.

4. Establishes procedures and standards for court-supervised treatment under a settlement agreement as an alternative to commitment.

5. Provides a presumption of good faith on the part of individuals initiating emergency detentions.

6. Requires special training for law enforcement officers in emergency detention and emergency protective placement procedures.

7. Requires health care coverage by health maintenance organizations, limited service health organizations and preferred provider plans of court-ordered mental health treatment of enrolled participants.

B. ACT 367

Creates a new review procedure for use in cases where either a minor age 14 years or older, or the minor's parent or guardian, refuses to provide informed consent for voluntary outpatient mental health treatment of the minor.

C. ACT 368

1. Directs the Department of Health and Social Services (DHSS) to develop and conduct training programs for community support program staff.

2. Creates a guardianship grant program for recruiting, training, monitoring and assisting guardians for persons determined to be incompetent; also creates a $250,000 appropriation for the DHSS to administer the program.

D. ACT 394

1. Requires the DHSS to establish program standards for jails, including requirements that each jail develop a written policy and procedure manual and have emergency crisis intervention services available.

2. Requires preparatory jail officer training to include training on "special needs" inmates.

3. Repeals a "sunset" provision which currently applies to an alternative commitment standard for state prison inmates.

4. Creates an alternative commitment standard for inmates who have been sentenced to jail, with a July 1, 1990 sunset date.

5. Specifies that law enforcement officers may initiate an emergency detention based on information reported by probation and parole officers.

6. Extends the time periods during which persons, committed under the "not guilty by reason of mental disease or defect" defense and conditionally released, may be redetained or supervised.

PART III

1987 WISCONSIN ACT 366: COMMITMENT STANDARDS AND PROCEDURES

A. BACKGROUND

1987 Wisconsin Act 366 contains provisions related to commitment standards and procedures and alternatives to commitment. The primary purpose of the Act is to help obtain treatment for mentally ill persons who have not been receiving treatment. In addition, the Act attempts to ensure that mentally ill persons are treated in settings which are the least restrictive of their personal freedom.

Act 366 includes specific provisions relating to the following types of mentally ill persons who refuse to obtain treatment voluntarily:

1. Persons who, but for care provided by family members, would meet one or more of the dangerousness standards for commitment.

2. Persons who do not meet one or more of the dangerousness standards because community services are available, but who will not avail themselves of these services.

3. Chronically mentally ill persons who are not competent to make medication decisions and who, due to their failure to take medications, are unable to provide for their own care in the community.

Also, Act 366 includes provisions which are intended to:

1. Provide a responsive emergency detention procedure and ensure that persons initiating this procedure are not reluctant to do so because of insufficient training or fear of personal liability.

2. Ensure that courts and counties are able to keep track of persons, and ensure that services are provided, throughout the commitment process and after the commitment period expires.

3. Ensure that commitment options include community-based treatment, where appropriate.

4. Improve and clarify current procedures for emergency detention, commitment, guardianship, protective services and protective placement.

Two of the procedures included in Act 366 are based on procedures that have been used in two of Wisconsin's counties. First, the Act

provides specific statutory authorization and procedures for a limited guardianship which is based on a procedure used in Dane County to provide outpatient treatment for chronically mentally ill persons. Second, the Act provides specific statutory authorization and procedures for a negotiated settlement process which is based on a procedure used in Milwaukee County to obtain voluntary treatment, under a court-approved treatment plan, for the subject of a commitment proceeding.

B. MAJOR PROVISIONS

1. Commitment and Detention Standards

Act 366 expands the third and fourth standards of dangerousness that apply to commitment, detention pending a final hearing and emergency detention. The commitment standards, as affected by Act 366, are set forth in the Appendix. The dangerousness standards for emergency detention, as affected by the Act, are similar to the dangerousness standards for commitment.

Prior law did not permit commitment or detention under the third or fourth standard of dangerousness, if reasonable provision for the person's protection or treatment was available in the community [s. 51.20 (1) (a) 2 c and d, 1985 Stats.].

Act 366 expands the third and fourth standards of dangerousness to allow commitment or detention under these standards, regardless of the availability of protection or treatment in the community, if:

a. There is a reasonable probability that the person will not avail himself or herself of the available community services; or

b. The available protection or treatment is food, shelter or other care provided by family members or others not associated with treatment programs.

2. Determination of Competency to Refuse Medication During Competency Proceedings

Under Act 366, upon the motion of any interested person at or after the probable cause hearing, but prior to a final commitment order, a court is required to determine whether there is probable cause to believe the individual meets all of the standards for court-ordered medication. Also, the court may make this determination upon its own motion. Prior law permitted, but did not require, a court to hold a hearing on this issue at or after the probable cause hearing.

To order medication under this provision, the court must find that: (a) the person is not competent to make decisions regarding medication; (b) the medication will have therapeutic value; and (c) the medication will not impair the person's ability to participate in legal proceedings.

The Act also clarifies that a court order for medication under this provision is effective only until a final order for commitment is issued or the petition is dismissed, unless a shorter period is specified by the court.

3. Determination of Competency to Refuse Medication After Commitment

Act 366 codifies a recent Wisconsin Supreme Court decision [State ex rel. Jones v. Gerhardstein, 141 Wis. 2d 710, 416 N.W. 2d 883 (1987)] holding that involuntarily committed individuals may not be forcibly administered psychotropic medication without first having been found by a court to be incompetent to refuse the medication.

The Act amends the current provisions relating to the right to refuse medication to specify that persons who have been involuntarily committed have the right to exercise informed consent with regard to all medication and treatment unless a court makes a determination, following a hearing, that the person is not competent to refuse medication. However, the Act retains the exception, under prior law, permitting the forcible medication of such persons, without a finding of incompetency to refuse medication, in an emergency situation in which the treatment is necessary to prevent serious physical harm to the patient or others.

4. Guardianship and Medication as a Protective Service

Act 366 creates specific statutory provisions for the appointment of a guardian for an individual alleged to be not competent to refuse psychotropic medication. Under the Act, an individual is "not competent to refuse psychotropic medication" if, because of chronic mental illness, he or she is incapable of expressing an understanding of: (a) the advantages and disadvantages of accepting treatment; and (b) the alternatives to accepting the particular treatment offered, after the advantages, disadvantages and alternatives have been explained to the individual.

Under prior law and under Act 366, a petition for a guardianship must state the nature of the individual's incapacity, specifying his or her incompetency or spendthrift habits. Under the Act, additional allegations must be made and proven if the petition for guardianship is not only for

the appointment of a guardian but also for an order for psychotropic medication. This type of petition must allege that:

a. The individual is not competent to refuse psychotropic medication.

b. The individual is likely to respond positively to psychotropic medication.

c. As a result of the individual's failure to take medication, the individual is unable to provide for his or her own care in the community. The individual's past history is relevant to determining his or her current inability to provide for his or her own care in the community.

d. Unless protective services, including medication, are provided, the individual will incur a substantial risk of physical harm or deterioration or will present a substantial risk of physical harm to others.

e. The individual has attained the age of 18 years.

Generally, the Act applies the same procedures that apply to other guardianships to the appointment of a guardian for the purpose of ordering psychotropic medication. However, for proceedings involving a guardianship for psychotropic medication, the Act also includes special provisions related to the right to remain silent during examination by a physician or psychologist; representation by counsel; requests for jury trials; hearing dates; and closed hearings.

Under the Act, if, after a court hearing, the allegations in the petition are proven, the court must appoint a guardian to consent to or refuse psychotropic medication on behalf of the subject. The court must also order the appropriate county department to develop a treatment plan. After reviewing the plan, the court must: (a) order protective services; and (b) order the appropriate county department to ensure that the protective services, including psychotropic medication, are provided to the subject as set forth in the treatment plan.

The Act also includes provisions for an automatic annual review, by the responsible county department, of whether the guardianship should be continued and whether any changes should be made in the treatment plan. A guardian ad litem must be appointed for the person at the time of the review. A court hearing on the continuation of the guardianship or the appropriateness of the treatment plan must be held if requested by the subject, his or her guardian, the guardian ad litem or any interested person and may be held upon the court's own motion.

These provisions of the Act are based on procedures currently used in Dane County. The purpose of these provisions is to provide specific statutory authorization and procedures for the limited guardianship.

5. Settlement Agreements

The statutes set forth various time periods within which probable cause and final commitment hearings must be held. If a hearing is not held within these time periods, the commitment action must be dismissed and the court loses jurisdiction over the subject of the commitment proceeding.

Act 366 provides that these time limitations may be waived by the subject of a commitment proceeding or by the subject's counsel, for up to 90 days from the date of the waiver, if the subject becomes a voluntary patient under a court-approved settlement agreement reached between the subject and the counsel representing the interests of the public. The settlement agreement must be in writing and must include a treatment plan. The subject's compliance with the settlement agreement must be monitored by the appropriate county department designated by the court. The Act provides a mechanism to continue the commitment proceedings if the subject of the settlement agreement fails to comply with the terms of the treatment plan.

These provisions of the Act are based on a negotiated settlement process used in Milwaukee County. The purpose of these provisions is to provide specific statutory authority and procedures for the negotiated settlement process.

6. Recommitment Evaluation

Act 366 requires the department to which an individual is committed to file an evaluation of the individual, and a recommendation regarding the individual's recommitment, with the committing court, the counsel for the defendant and the counsel for the interests of the public. The filing must be made 21 days prior to the expiration of the individual's period of commitment.

The purpose of this requirement is to ensure that individuals whose commitments are expiring are evaluated to determine whether they should be recommitted.

7. Procedures Upon Transfer to a More Restrictive Treatment Facility

Under prior law and under Act 366, a person who has been involuntarily committed to a treatment facility may be transferred between treatment facilities or transferred from a facility to a community support program. The transfer may be made only if the transfer: (a) is consistent with reasonable medical and clinical judgment; and (b) is the least restrictive treatment alternative appropriate to the patient's needs.

If the person is conditionally transferred to a less restrictive facility or to a community support program, he or she must be informed at the time of the transfer that violation of any of the conditions of the transfer may result in specified consequences which may include transfer back to a facility which imposes greater restrictions on his or her personal freedom.

Act 366 creates new procedural rights for persons who, due to an alleged violation of a condition of a transfer to less restrictive treatment, are transferred:

a. Between treatment facilities, if the transfer results in a greater restriction of personal freedom for the patient for longer than five days; or

b. From outpatient to inpatient status for longer than five days.

Under the Act, these patients are entitled to:

a. A written statement of the reasons for the transfer and the factual basis for the transfer, within 24 hours after the transfer has occurred.

b. Notice, both oral and written, of the rights under items c to f, below, within 24 hours after the transfer has occurred.

c. An informal hearing, before a hearing officer, on the issues of: (1) whether the patient violated the conditions of a transfer to a less restrictive setting; and (2) whether the form of treatment resulting from the transfer is least restrictive of the patient's personal liberty, consistent with the treatment needs of the patient. The hearing must be held within 10 days after the transfer, unless waived, in writing, by the patient in consultation with counsel.

d. A written statement of the hearing officer's decision setting forth the reasoning and the facts on which the decision is based.

e. The right to appeal the decision of the hearing officer to the court where the facility is located or to the court which issued the patient's commitment order. The appeal may be taken by the patient or by the DHSS or county department seeking the transfer.

f. The right to counsel provided at public expense, if the patient is indigent.

8. Services After Discharge or Transfer

Under prior law and under Act 366, before his or her discharge from an inpatient facility or transfer from inpatient to outpatient status, a chronically mentally ill person must be referred to a community support program for evaluation of the need for and feasibility of: (a) the provision of community-based services; and (b) the provision of aftercare services.

The DHSS and any person, director or board authorized to discharge or transfer patients also are required to ensure that a "proper residential living arrangement" and "necessary transitionary services" are available and are provided for any patient being discharged or transferred from inpatient treatment.

Act 366 amends these requirements to:

a. Require the DHSS, the county department or other person having authority to transfer or discharge a chronically mentally ill patient, to assist the patient in applying for any public assistance for which he or she may qualify; and

b. Specify that a "proper living arrangement" does not include a shelter facility which provides temporary lodging for homeless individuals or families. However, these facilities may be used for short-term emergency placements of these patients for a period not to exceed 10 days.

9. Guardians' Standards of Performance

Under the Wisconsin Supreme Court's decision in In re Guardianship of Bose, 39 Wis. 2d 80, 158 N.W. 2d 337 (1968), guardians of the person (as distinguished from guardians of the estate) are held to a standard of care of a ward known as the "prudent person rule." Act 366 provides that a guardian of the person is immune from civil liability for acts or omissions performed in compliance with a standard of performance based on the standard articulated by the Court.

Under the Act, a guardian of the person who performs his or her duties on behalf of the ward in good faith with the degree of diligence and prudence that an ordinarily prudent person exercises in his or her own affairs, and in the ward's best interests, is immune from liability for his or her acts or omissions in performing his or her duties.

10. Emergency Detention; Presumption of Good Faith

Under prior law and under Act 366, any individual who takes a person into custody under the emergency detention procedure is immune from liability for actions taken in good faith.

Act 366 creates a statutory presumption of good faith on the part of individuals who follow the emergency detention procedure for purposes of applying this immunity. The presumption may be overcome only by proving to a reasonable certainty that the individual did not act in good faith by evidence that is clear, satisfying and convincing (the highest burden of proof in a civil action).

11. Emergency Protective Placement Standards

Under prior law, a person could be taken into custody under an emergency protective placement if it appeared probable that the person would suffer irreparable injury or death as a result of developmental disabilities, infirmities of aging, chronic mental illness or other like incapacities if not immediately placed. Risk of harm to others was not included as a basis for an emergency protective placement.

Act 366 allows a person who presents a substantial risk of serious physical harm to others to be taken into custody under an emergency protective placement. The language added to the emergency protective placement standard by the Act is similar to one of the current standards for permanent protective placement.

12. Training in Emergency Procedures

Act 366 requires training in emergency detention and emergency protective placement procedures to be included in the preparatory training programs that law enforcement officers are required to complete.

The Act also requires county departments of community programs to implement in-service training programs for law enforcement officers regarding emergency detention and emergency protective placement. Law

enforcement agencies are required to designate at least one person within the agency to attend these in-service programs.

The Act directs the Division of Law Enforcement Services in the Department of Justice (DOJ) to cooperate in the establishment of in-service, advanced and special courses on emergency detention and emergency protective placement procedures. This requirement may be satisfied by cooperating with county departments of community programs in establishing the county in-service training courses that they are required to implement under the Act.

Under the Act, these provisions go into effect on November 1, 1988.

13. Crisis Intervention Services Study

Under prior law and under Act 366, each county department of community programs must establish a community support program within the limits of available funds. Services provided by community support programs shall include crisis intervention services. The DHSS must promulgate standards for community support programs, provide technical assistance, consultation and funding for these programs and monitor the establishment and continuing operation of the programs' compliance with the DHSS's standards.

Act 366 requires the DHSS to conduct a study of the implementation and continuing operation of crisis intervention services by the county departments. The study shall include an inquiry into the expenditure by counties of county, state and federal moneys for crisis intervention services; the number of persons served annually by crisis intervention services in each county; and the estimated cost, per county, of expanding crisis intervention services to meet the estimated need in that county. The Act requires the DHSS to report its findings to the Legislature not later than January 1, 1989.

14. Coverage of Court-Ordered Services Under a Medical Plan

Act 366 contains requirements that apply to an enrolled participant in a health maintenance organization, limited service health organization or preferred provider plan who is examined, evaluated or treated for a nervous or mental disorder pursuant to an emergency detention, a court order in a commitment proceeding or a court order for guardianship and protective services.

Under the Act, a subject of a commitment proceeding may not be examined, evaluated or treated pursuant to a court order unless the court

first attempts to determine whether the person is an enrolled participant of an organization or plan. If the court is able to determine that the person is an organization or plan participant, it must then notify the organization or plan that the person is in need of an examination, evaluation or treatment for a nervous or mental disorder.

Under the Act, the organization or plan covering the participant must, without regard to whether there has been a referral from the primary provider, take one of the following actions:

a. If the examination, evaluation or treatment is performed by a provider who has a provider agreement with the organization or plan covering the participant, the organization or plan must provide the service to the participant pursuant to: (1) the terms of the health care plan covering the participant; and (2) the agreement between the organization or plan and the provider; or

b. If the examination, evaluation or treatment is performed by a provider who does not have a provider agreement with the organization or plan covering the participant, the organization or plan must reimburse the provider for the service to the participant. For nonemergency services, this reimbursement is not required if the organization or plan could have provided the service through its own provider arrangements. For emergency services, the organization or plan is only required to make reimbursement if the provider notifies the organization or plan of the service within specified time periods. For either emergency or nonemergency services, the reimbursement of the provider for the service is limited to the maximum amount reimbursable for the service under the Medical Assistance program.

The organization or plan is only required to make available, or make reimbursement for, the examination, evaluation or treatment, to the extent that it would have made the medically necessary service available to the enrolled participant, if: (a) any required referral from the primary provider had been made; and (b) the service had been performed by a provider selected by the organization or plan.

15. Extension of Time Limitation for Final Hearing

Under prior law, a final hearing in a commitment proceeding was required to be held within a specified time period after the court determined that there was probable cause to believe that the person meet the commitment standard. In no event could this time period exceed 30 days from the probable cause determination or from the date the person was released from detention under a conditional release agreement, if any.

Under Act 366, the final hearing may be postponed up to an additional seven calendar days, at the request of the subject individual or his or her counsel.

PART IV

1987 WISCONSIN ACT 367: OUTPATIENT MENTAL HEALTH TREATMENT OF MINORS

A. BACKGROUND

Under current law, voluntary mental health treatment of a minor 14 years of age or older may be provided only with the written, informed consent of the minor and the minor's parent or guardian.

If the minor refuses to consent to voluntary treatment, the minor's parent or guardian has no recourse other than to: (1) initiate a commitment proceeding if the minor meets one of the dangerousness standards for commitment (set forth in the Appendix to this Memorandum); (2) file a petition, under ch. 48, Stats., alleging that the minor is in need of protection or services; or (3) forego the treatment of the minor.

If the minor wishes to seek treatment, but the minor's parent or guardian does not agree to the treatment, to obtain treatment, the minor must: (1) file a petition, under ch. 48, Stats., seeking treatment based on a finding that he or she is in need of protection or services; or (2) forego treatment.

The purpose of 1987 Wisconsin Act 367 is to create a nonadversarial informal process to review whether the refusal of the minor or the minor's parent or guardian to provide informed consent is unreasonable. This informal procedure does not apply to inpatient mental health treatment or treatment that involves psychotropic medication.

B. MAJOR PROVISIONS

Act 367 provides a mechanism to review a refusal, by either a minor 14 years of age or older or the minor's parent or guardian, to provide informed consent for mental health treatment of the minor, other than inpatient treatment or treatment involving psychotropic medication. This review is to be conducted by a mental health review officer appointed by the juvenile court in the county where the parent or guardian resides. Following the officer's review, the refusal is reviewable by the juvenile court.

The Act sets forth the required contents of the petition for review. It also sets forth the standards for reviewing a refusal to provide informed consent. These standards are based on current standards for

reviewing the admission of a minor under the age of 14 years to an inpatient facility. The standards are as follows:

1. The informed consent of the minor or his or her parent or guardian is being unreasonably withheld;

2. The minor is in need of treatment;

3. The particular treatment sought is appropriate for the minor and is the least restrictive treatment available; and

4. The treatment would be in the best interest of the minor.

The Act provides time limits within which notice of the hearing shall be provided and the hearing shall be held. The Act also provides for notification of the county department of community programs or the county department of developmental disabilities of the contents of the petition, and permits the court to consider any recommendations of the county department regarding the minor's need for, and the appropriateness and availability of, outpatient treatment.

The Act does not provide for the appointment of counsel upon the filing of a petition for a review hearing by the mental health review officer because this procedure is intended to be nonadversarial.

Under the Act, a person aggrieved by the finding of the mental health review officer may request the juvenile court to review the refusal. Alternatively, a petition for court review may be filed without a prior hearing or finding by a mental health review officer, if the review officer finds that immediate court review is in the best interest of the minor.

The procedures for court review of the refusal are adversarial. The Act requires that counsel be appointed as part of the court procedure and permits the appointment of a guardian ad litem, if necessary. Standards for review of the refusal to provide informed, written consent by the juvenile court are the same as the standards used by the mental health review officer. The decision of the court is reviewable by the Court of Appeals.

The effect of a finding, by a mental health review officer or by a juvenile court, that the informed consent of the minor or the minor's parent or guardian is being unreasonably withheld is that the person's consent is <u>not</u> required for outpatient mental health treatment for the minor other than treatment by psychotropic medication. However, this finding does not constitute a finding that the minor is mentally ill.

PART V

1987 WISCONSIN ACT 368: GUARDIANSHIP GRANTS AND COMMUNITY SUPPORT PROGRAM STAFF TRAINING

A. BACKGROUND

1987 Wisconsin Act 368 includes provisions which are intended to:

1. Improve training opportunities for professional staff of community support programs.

2. Increase the number of guardians available for incompetent persons, including chronically mentally ill adults subject to guardianship proceedings for the purpose of administering psychotropic medication, created by Act 366, and provide training and assistance for guardians (see Part III, B, 4, of this Memorandum for a description of the new proceedings for guardianship and psychotropic medication).

B. MAJOR PROVISIONS

1. Community Support Program Staff Training

Act 368 directs the DHSS to develop and conduct training programs for community support program staff.

2. Guardianship Grant Program

Act 368 creates a guardianship grant program, to be administered by the DHSS, with an appropriation of $250,000 for fiscal year 1988-89. Under this program, the DHSS shall award grants to county agencies and private, nonprofit agencies for recruiting, training, monitoring and assisting guardians for persons determined to be incompetent under ch. 880, Stats.

PART VI

1987 WISCONSIN ACT 394: MENTALLY ILL INMATES

A. BACKGROUND

The provision of mental health services to jail inmates is primarily the responsibility of county mental health agencies and jails. Under prior law, the DHSS did not have the authority to set program requirements for the jails, there were no state standards on screening jail inmates for mental health problems and there were no state standards for mental health services provided to jail inmates. Also, jail officers have received limited training regarding the needs of jail inmates who may have mental health problems.

1987 Wisconsin Act 394 includes provisions which are intended to:

1. Assist county mental health agencies and jails in carrying out their responsibilities for providing mental health services to jail inmates;

2. Provide appropriate training to jail officers; and

3. Help ensure that adequate and appropriate services are provided to mentally ill inmates.

In addition to its jail-related provisions, Act 394 addresses concerns which have been expressed regarding the length of supervision of criminally committed persons who are conditionally released and repeals the July 1, 1989 sunset date on the alternative commitment standard for state prison inmates.

B. MAJOR PROVISIONS

1. Jail Standards

Act 394 requires the DHSS to establish program standards, by rule, for jails (including municipal lock-ups) and houses of correction. In developing the standards, the DHSS shall consult with the DOJ.

Under the Act, as partially vetoed by Governor Thompson, the standards must include requirements that each jail or house of correction: (a) have crisis intervention services available for medical illnesses or disabilities, mental illnesses, developmental disabilities and alcohol or other drug abuse problems; and (b) develop a written policy and procedure

manual which reflects the unique characteristics of the jail or house of correction. The policy and procedure manual must include policies and procedures for screening inmates for medical illnesses or disabilities, mental illnesses, developmental disabilities and alcohol or other drug abuse problems. The manual must also specify the facilities and programs, including outside facilities and programs, which will be provided for long-term inmates.

Under the Act, each jail or house of correction must submit a policy and procedure manual to the DHSS for approval no later than 1989. Subsequent substantive changes in the manual must also be submitted to the DHSS for approval.

2. Jail Officer Training

Under prior law, no person could be appointed to a permanent position as a jail officer, on or after July 2, 1983, unless the person had completed a preparatory program of at least 80 hours of jail officer training. Approximately eight of these 80 hours of required training were devoted to the care and supervision of "special needs" inmates (inmates who may be emotionally distressed, mentally ill, suicidal, developmentally disabled or alcohol or drug abusers).

Recently, curriculum for a competency-based instruction program for jail officers has been developed. This course is designed for 110 to 120 hours of preparatory jail officer training. Approximately 10 to 12 hours of the 110 to 120 hours would be devoted to the care and supervision of "special needs" inmates.

Act 394, as partially vetoed by Governor Thompson, requires that, effective June 30, 1988, at least 16 hours of preparatory training shall be devoted to methods of supervision of "special needs" inmates, including those who may be emotionally distressed, mentally ill, suicidal, developmentally disabled or alcohol or drug abusers. In his veto message, dated April 23, 1988, the Governor said that it is intended that the 16 hours of special needs training will be in addition to the 80 hours of preparatory training currently required. However, this result is not clear under the language of the Act, as vetoed.

Act 394 requires jail officers appointed prior to July 2, 1983, who have not completed the 80-hour program, to complete the 80-hour preparatory training program and the special needs inmates training program by June 30, 1993. Jail officers who satisfactorily completed the 80-hour preparatory training program (whether appointed prior to or after July 2, 1983) are also required to complete the special needs training.

3. Alternative Commitment Standard for State Prison Inmates

Generally, under prior law and under Act 394, a person may be committed if he or she is mentally ill, drug dependent or developmentally disabled; a proper subject for treatment; and dangerous to himself or herself or to others under at least one of four standards of dangerousness. However, due to the problem of proving current or recent dangerous behavior of persons who are confined to correctional institutions, an alternative standard has been developed for inmates of state prisons. Under the alternative standard, a showing of dangerousness is not required. A state prison inmate may be committed if he or she is mentally ill, a proper subject for treatment and in need of treatment.

The statutes also require that, prior to the use of the alternative commitment standard for state prison inmates, the facility must attempt to use less restrictive forms of treatment and ensure that the inmate has been fully informed about his or her treatment needs and rights and the mental health services available to the inmate. As a further protection, the DHSS is required to promulgate rules establishing standards for the use of psychotropic drugs on state prison inmates committed under the alternative standard.

Commitments of state prison inmates under the alternative standard may be for a total period not to exceed 180 days in any 365-day period. In no case may the commitment continue beyond the inmate's date of release under the criminal sentence.

The alternative standard was scheduled to "sunset" on July 1, 1987 or the effective date of the 1987-89 Biennial Budget Act, whichever is later. 1987 Wisconsin Act 27, the fiscal year 1987-88 Budget Act, changed the sunset date from July 1, 1987 to July 1, 1989.

Act 394 repeals the July 1, 1989 "sunset" provision. Thus, the alternative standard will continue in effect unless the Legislature takes affirmative action to repeal or otherwise change the standard.

4. Alternative Commitment Standard for Jail Inmates

Act 394 creates an alternative standard for the commitment of inmates of county jails and houses of correction who are under criminal sentence. The newly-created commitment standard is identical to the alternative standard currently applicable to state prison inmates. Under the new standard, a petition for the commitment of a county jail or house of correction inmate shall allege that the inmate is mentally ill, a proper subject for treatment and in need of treatment.

As for state prison inmates, prior to filing a petition for the commitment of a jail inmate under the alternative standard, the sheriff or other jail or house of correction administrator is required to:

a. Attempt to use less-restrictive forms of treatment;

b. Ensure that the individual has been fully informed about his or her treatment needs, the mental health services available to him or her and his or her rights; and

c. Ensure that the inmate has had an opportunity to discuss, with a licensed physician or a licensed psychologist, his or her needs, the services available and his or her rights.

As for state prison inmates, a commitment of a jail inmate under the alternative standard may be for a total period not to exceed 180 days in any 365-day period and in no case may the commitment continue beyond the inmate's date of release under the criminal sentence.

The Act creates a "sunset" date for the alternative standard for jail inmates of July 1, 1990.

5. Reports on Mental Health Treatment of Jail Inmates

Act 394 requires the sheriff or other keeper of a jail or house of correction to report, annually, to the DHSS, on:

a. The number of jail inmates who were transferred to a state or county treatment facility during the previous year under a commitment, an emergency transfer or voluntarily; and the length of stay of each prisoner in the treatment facility;

b. The number of inmates who were committed during the previous year to outpatient treatment under the new alternative standard and who were treated in the jail with psychotropic medication, as well as each inmate's diagnosis and types of drugs used; and

c. A description of the mental health services available to inmates on either a voluntary or involuntary basis.

6. Standards for Involuntary Use of Drugs on Jail Inmates

Act 394 requires the DHSS to establish standards and procedures for the use of, and periodic review of the use of, psychotropic medication on inmates in a county jail or house of correction who are being

involuntarily treated in the jail or house of correction under either the newly-created alternative commitment standard or the current commitment standards.

7. Criminally Committed Persons

Under prior law and under Act 394, if a defendant in a criminal action pleads, and is found by the court to be, not guilty of a crime by reason of mental disease or defect, the defendant is not convicted of the crime or sentenced. Instead, the defendant is automatically committed to the DHSS for custody, care and treatment under a "criminal commitment."

The DHSS may not hold the person under a criminal commitment beyond the maximum period for which the person could have been imprisoned if convicted of the offense charged, minus the credit earned for good time under ss. 53.11 and 973.155, Stats. If a person is held under criminal commitment for this maximum period, the DHSS has no authority to supervise the person for an additional period upon discharge. However, the DHSS or other interested parties may petition for the civil commitment of the person when he or she is discharged.

During the criminal commitment period, the court ordering the commitment may discharge the person or conditionally release the person, if it finds that he or she can be released from the treatment facility without posing a danger to himself or herself or to others. Also, the DHSS, upon the recommendation of the director of the treatment facility, may authorize the conditional release of the person, subject to supervision, without an order from the court, if the court does not object within 60 days of being notified of the pending conditional release.

Under prior law, the maximum time period during which the court could revoke a conditional release or the DHSS could supervise the person was the shorter of: (a) five years after the date of the conditional release; or (b) the maximum period for which the person could have been imprisoned, if convicted, minus any credit for good time under ss. 53.11 and 973.155, Stats. Act 394 extends this time period to the maximum period for which the defendant could have been imprisoned, if convicted, minus any credit for good time under s. 53.11 or 973.155.

C. VETOES

In signing Act 394 into law, Governor Tommy G. Thompson exercised his partial veto authority to delete several provisions from Assembly Bill 680, as passed by the Legislature. Specifically, the Governor vetoed the following provisions:

1. A requirement that an annual report, submitted by the DHSS to the Legislature, include a summary of the contents of the reports filed with the DHSS by sheriffs or jail officers on mental health services provided to jail and house of correction inmates. [The jail and house of correction reports are described in Section B, 5, above.]

2. A requirement that jails and houses of correction have crisis intervention services available 24-hours per day. Thus, the Act requires simply that jails and houses of correction have crisis intervention services available.

3. The expansion, under Assembly Bill 680, of the 80 hours of required jail officer training described in Section B, 2, above, to a total of 120 hours of training. In his veto message dated April 23, 1988, the Governor stated that it is intended that the 16 hours of special needs training be in addition to the 80 hours of training required of all jail officers.

The Governor also vetoed an expenditure authorization increase of $260,000 program revenue (PR) for the DOJ in fiscal year 1988-89 to cover the costs of the additional training requirement. The veto message indicated that the DOJ may use the process under s. 16.515, Stats., to request any additional expenditure authorization needed to cover the 16 hours of special needs inmates training and the training for previously exempt jail officers.

4. The creation of an office of jails within the DHSS. This provision would have directed the DHSS to transfer to the new office of jails responsibilities of the Division of Corrections related to jails and houses of correction, including: (a) the responsibilities for supervising and inspecting jails and houses of correction and approving their construction plans; and (b) the responsibilities for establishing program standards for jails and houses of correction and approving their policy and procedure manuals.

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APPENDIX

COMMITMENT STANDARDS, AS AMENDED BY 1987 WISCONSIN ACT 366

COMMITMENT STANDARDS, AS AMENDED BY 1987 WISCONSIN ACT 366

Under s. 51.20 (1) (a), Stats., as affected by 1987 Wisconsin Act 366, an individual may be committed if:*

1. ~~It~~ The individual is mentally ill, drug dependent, or developmentally disabled and is a proper subject for treatment~~;~~ and.

2. ~~It~~ The individual is dangerous because ~~the individual~~ he or she does any of the following:

a. Evidences a substantial probability of physical harm to himself or herself as manifested by evidence of recent threats of or attempts at suicide or serious bodily harm~~;~~.

b. Evidences a substantial probability of physical harm to other individuals as manifested by evidence of recent homicidal or other violent behavior, or by evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them, as evidenced by a recent overt act, attempt or threat to do serious physical harm. In this ~~subparagraph~~ subd. 2. b, if the petition is filed under a court order under s. 48.30 (5) (c) 1, a finding by the court exercising jurisdiction under ch. 48 that the child committed the act or acts alleged in the petition under s. 48.12 or 48.13 (12) may be used to prove that the child exhibited recent homicidal or other violent behavior or committed a recent overt act, attempt or threat to do serious physical harm.

c. Evidences such impaired judgment, manifested by evidence of a pattern of recent acts or omissions, that there is a substantial probability of physical impairment or injury to himself or herself. The probability of physical impairment or injury is not substantial under this ~~subparagraph~~ subd. 2. c if reasonable provision for the subject individual's protection is available in the community and there is a reasonable probability that the individual will avail himself or herself of these services, if the individual is appropriate for protective placement under s. 55.06 or, in the case of a minor, if the individual is appropriate for services or placement under s. 48.13 (4) or (11). The subject individual's status as

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*The language deleted from these standards by Act 366 is shown ~~stricken--through~~; the language added by the Act is shown underscored.

a minor does not automatically establish a substantial probability of physical impairment or injury under this ~~subparagraph;--or~~ subd. 2. c. Food, shelter or other care provided to an individual who is substantially incapable of obtaining the care for himself or herself, by a person other than a treatment facility, does not constitute reasonable provision for the subject individual's protection available in the community under this subd. 2. c.

d. Evidences behavior manifested by recent acts or omissions that, due to mental illness, he or she is unable to satisfy basic needs for nourishment, medical care, shelter or safety without prompt and adequate treatment so that a substantial probability exists that death, serious physical injury, serious physical debilitation or serious physical disease will imminently ensue unless the individual receives prompt and adequate treatment for this mental illness. No substantial probability of harm under this ~~subparagraph~~ subd. 2. d exists if reasonable provision for the individual's treatment and protection is available in the community and there is a reasonable probability that the individual will avail himself or herself of these services, if the individual ~~can receive~~ is appropriate for protective placement under s. 55.06 or, in the case of a minor, if the individual is appropriate for services or placement under s. 48.13 (4) or (11). The individual's status as a minor does not automatically establish a substantial probability of death, serious physical injury, serious physical debilitation or serious disease under this ~~subparagraph~~ subd. 2. d. Food, shelter or other care provided to an individual who is substantially incapable of obtaining the care for himself or herself, by any person other than a treatment facility, does not constitute reasonable provision for the individual's treatment or protection available in the community under this subd. 2. d.